SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 902

HENRY KLEIN

v.

UNITED STATES OF AMERICA

ROBERT HAMILTON

v.

UNITED STATES OF AMERICA

WALTER F. RIGGIN

v.

UNITED STATES OF AMERICA

EARL W. TAVENNER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners pray that a Writ of Certiorari be issued to reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on July 31, 1970, and the denial on August 28, 1970, of the Petition for Rehearing en banc.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals of the District of Columbia was decided on July 31, 1970. The Opinion of the United States Dsitrict Court for the District of Col-

umbia has not yet been reported, but a copy of said Opinion is attached hereto and prayed to be taken as a part hereof, marked as appendix No. 1.

JURISDICTION

The Opinion of the United States Court of Appeals for the District of Columbia was rendered on the 31st day of July, 1970, and the petition for rehearing en banc was denied on August 28, 1970. An Order extending time to file petition for certiorari to and including October 27, 1970 was entered September 28, 1970. Jurisdiction to issue the Writ is found in the provisions of 28 U.S.C.A., Sec. 1254.

QUESTIONS PRESENTED

1. Are tape recordings and oral testimony of telephonic and face to face conversations between a defendant and an informer admissible in evidence, in the light of recent Supreme Court decisions, and was consent to such electronic surveillance given by the informer freely and voluntarily, without direct or implied threat or promise?

2. Whether the use against one Appellant of the tape recordings made after the end of the conspiracy, prejudiced the other Petitioners and denied them a fair trial, in view of the fact that the other Petitioners were mentioned in the tape recording and the prosecution emphasized that fact? Does the instant case justify an extension of *Bruton* to require a new trial for the petitioners notwithstanding the ephemeral opportunity for confrontation.

3. Was the search and seizure in this case under a warrant permitting the officers to seize all books, records, papers and paraphernalia "maintained in the furtherance of the conspiracy" too broad under the rule of *Stanford v. Texas,* 279 U.S. 476?

Can evidence against a defendant be introduced in a conspiracy trial where such evidence does not go to the conspiracy but only to the substantive crime of which the defendant had already been convicted?

CONSTITUTIONAL AMENDMENT AND STATUTES INVOLVED

Constitutional Provisions:

Amendment 4;

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures***no warrants shall issue***particularly describing the places to be searched, and***things to be seized***

Amendment 5;

No person shall***be deprived of life, liberty, or property, without due process of law***

Statutes Involved:

Title 18, U.S. Code, Section 371, Conspiracy

Title 22, D.C. Code, Section 2201. Grand Larceny

Title 22, D.C. Code, Section 2205. Receiving stolen goods.

Title 18, U.S. Code, Section 2314. Transportation of stolen goods.

Title 47, U.S. Code, Section 605. Unauthorized publication or use of communications.

STATEMENT

The Petitioners were tried in the lower Court on a seven-count indictment, charging all Petitioners with the crime of conspiracy and the individual Petitioners with certain substantive crimes. The conspiracy count alleged that the conspiracy commenced on January 1, 1964 and that Petitioners conspired, combined, confederated and agreed together and with each other and with Robert Earl Barnes and others to commit crimes against the United States. The indictment alleged that as part of the conspiracy, information would be provided to Barnes to facilitate the carrying out of the

proposed offenses, and that he would be aided and abetted by others in carrying out said offenses.

Prior to indictment, a search warrant was obtained from the United States Commissioner upon the affidavit of certain police officers to search premises 1009 E Street, N.W., occupied by Klein Jewelers, (Appellant Klein's place of business).

A motion to suppress and for return of property was filed. The motion was denied. (Tr-650).

The trial record in the case contains in excess of 7000 pages. The principal witness for the prosecution was Barnes, who, by his own admission, was a professional burglar, having been released from Missouri State penitentiary shortly before January 1, 1964. He testified, "I know my word isn't worth anything" (TR-4144); that if it suited his purpose and would help him, he would lie. He further testified that while being held as a material witness for the government, he was provided with living quarters on the seventh floor of the United States Court House, and was permitted to have whiskey and nocturnal visits by women. (TR-1663-4).

Barnes also testified as follows:

That as soon as he came to the District of Columbia he began burglarizing and came to know one James "Skinner" Skeens who took Barnes to meet petitioner Klein at Klein's Jewelry store. Skeens told Klein that Barnes was looking for somebody to sell some hot stuff to, and that Klein said that he would buy what Barnes could get, and further, that he would set up some places for him to burglarize "on a 10% basis with first choice to purchase the merchandise".

Barnes then testified to hundreds of house breakings, stating that petitioner Klein gave him the addresses of numerous houses to break into and that he did break into them.

Barnes testified the petitioner Hamilton had assisted him in two housebreakings, one known as the "French Poodle" where furs were stolen. The jury found him not guilty of

this. Barnes also stated that Hamilton assisted him in robbing the "Greek Church" on 16th Street, N.W.

With respect to Petitioner Riggin, the only testimony was that of witness Barnes, who testified that Riggin had informed him that one Sara Kotz had cash in her apartment and that he, Barnes, had stolen the money and had given Riggin part of it. There was no corroboration of this involvement of Riggin. Riggin was also accused by Barnes in connection with the housebreaking of the home of George Sharman. Barnes stated that Riggin had told him that there was money there and that he entered the premises and found about $300.00. He gave half of it to Riggin. Again, there was no corroboration.

With respect to Petitioner Tavenner, Barnes' testimony implicated him in only three matters. The Bastedo housebreaking, the McLean diamond theft and the third and last charge made by Barnes against Tavenner was the housebreaking into the home of one Nader. Barnes testified that he broke into Nader's home as a result of information from Tavenner. There was no corroboration of Barnes' statement as regards Tavenner's involvement.

Testimony developed at the trial that Robert Earl Barnes, a self-confessed housebreaker came to the District of Columbia in early 1964, after having committed several hundred burglaries in St. Louis and serving a total of 4 years in prison for all his collected criminal acts then having become a government agent or informer.

After being incarcerated in the District of Columbia in 1965, he performed as he did in St. Louis, and was the major government witness and organizer of the case against petitioners which was tried during the months of October, November and December 1967.

The Government produced witnesses to corroborate Barnes in the "Greek Church" housebreaking which involved petitioner Hamilton. Petitioner Hamilton had already been tried and convicted of the "Greek Church" robbery and the testimony offered at this trial on the charge of conspiracy was ex-

actly the same as in the case that he had already been convicted of. The only other corroboration against any of the other petitioners offered by the government that these petitioners were involved with Barnes in the housebreakings that he confessed to, were certain tape recordings of telephone conversations carried on between petitioner Klein and James "Skinner" Skeens and his wife Marsha Skeens, on November 29, 1965, December 10, 1965, December 21, 1965, February 5, 1966, and February 7, 1966. These two informers were not called by the government as witnesses to testify before the jury. All of these recording occurred after the termination of the conspiracy alleged in the indictment and the Court instructed the jury that these conversations were admissible only against petitioner Klein, and should not be considered by the jury as to the other petitioners.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals in its opinion, sustained the intorduction into evidence of electronically monitored conversations of Klein with an informer who was cooperating with the government. The Court recognized that the Supreme Court has before it the case of *United States v. White*, 7 Cir. 405 F.2d 838, Cert. Granted, 394 U.S. 957, which may affect the admissibility into evidence of these statements as shown by their opinion on page five; "We are, of course, aware that the Supreme Court in White, however, may reconsider its prospective only ruling in Desist. We need not wait on White, however, because appellants position on this issue can be protected through an application for a Writ of Certiorari." Not discussed by the Court, however, is a second ground of objection to the intercepted telephone conversations, namely, the nature of the consent given by the informer.

Although Skinner Skeens and his wife, Marsha, both of whom did not testify before the jury, stated out of the presence of the jury that they knew their conversations were being monitored and agreed to have them recorded

and divulged, such consents were obviously induced by hope of favor and leniency and of escape from prosecution.

As long ago as 1939, the Supreme Court of the United States, in interpreting § 605 of the Communications Act of 1934, 47 USCA 5605, held that while one may consent to have his telephone messages intercepted or divulged, such consent must be voluntarily given and not an enforced agreement. *Weiss v. United States,* 308 U.S. 321. In *United States v. Laughlin,* 222 F. Supp. 264 (1963), the United States District Court for the District of Columbia ruled that consent to the interception of telephone conversations was involuntary when it resulted from an implied threat made to a witness of being indicted for perjury if she did not cooperate. The Court has held that consent to a search must be given freely and voluntarily and without pressure, either physical or psychological. *Judd v. United States,* 89 U.S. App. D.C. 64, 190 F.2d 649, and *Williams v. United States,* 105 U.S. App. D.C. 41, 263 F.2d 487. It is submitted that the rule applicable to consent to a search of one's premises is equally applicable to consent to have one's conversations intercepted, for the basic statutory prohibition of the Federal Communications Act was grounded upon "broad considerations of morality and public well-being." *Nardone v. United States,* 308 U.S. 338. The Supreme Court there held that interception of telephone messages was "inconsistent with ethical standards and destructive of personal liberty."

It appears clear from the facts in the records, that the consent of Mr. and Mrs. Skeens was given out of a desire to gain favor, leniency and escape from prosecution. Mrs. Skeens knew that an investigation was being conducted in connection with the Barnes allegation, that many people would be indicted and that she possibly could be one of these; she also knew that both her husband and her father were very much involved in the criminal activities of Barnes (TR-322). Mrs. Skeens' decision to become a government informer and to lend her cooperation to obtaining electronic evidence was to gain immunity for herself, her father and her husband. Thus the fact that she admitted receiving sto-

len property and committing perjury was without fear of prosecution.

Through Mrs. Skeens' help and the help of the United States Attorney, in February of 1966, Mr. Skeens was released from custody on a charge for which he was then incarcerated, although in December of 1965, prior to his cooperation with the government, his petition for bond had been turned down. On the day of his release, or the next day, Mr. Skeens made the telephone call to Appellant Klein.

Although Mr. Skeens was later indicted with this Appellant, he has never been tried. As a detective testified, "I just got the impression that this man decided to cooperate with the government to get out of jail and to alleviate his problem" (TR-63). The record in this case also reveals that as recent as March of 1968 (after Petitioners' convictions), the United States Attorney arranged with a United States Commissioner in Pennsylvania to have Mr. Skeens' bond reduced from $5,000 to his own recognizance.

The record further reveals that the Assistant United States Attorney made arrangements for Mr. Skeens, while incarcerated, to be brought to the Court House to spend time with his wife and young child; it reveals also that Mr. Sullivan, Assistant United States Attorney, appeared before both Judge Matthews and Judge Curran to inform them that Mr. Skeens was cooperating with the government in the Barnes matter, and that they should be aware of this before imposing any sentence upon Mr. Skeens (TR-277-278).

It is obvious that Mrs. Skeens' willingness to cooperate with the government did not go unrewarded, since neither she nor her father was ever charged with any offense.

It is submitted that Petitioners' contention is of such importance and weight as to render the recorded telephone conversations inadmissible as a matter of law, and that the Court should have considered the matter rather than to have ignored it. The opinion of the Court is silent on this important issue.

2. The United States District Court of Appeals of the District of Columbia agreed with petitioners position that it comes within the rule announced by the Supreme Court in *Bruton v. United States,* 391 U.S. 123 (1968), stating:

> "Thus the trial court's instructions to the jury that Klein's out-of-court statements were evidence only against Klein were not adequate to protect his three co-defendants if they were prejudiced by these out-of-court statements."

The Court then went on to say that in its opinion, beyond a reasonable doubt, the inadmissible evidence did not affect the jury's verdict as to petitioners herein.

The inadmissible evidence referred to were tape recordings of telephone conversations, particularly one which seemingly connected two of the present petitioners (Hamilton & Riggin) with their co-defendant Henry Klein.

We say seemingly because it is not the words that were used in this conversation but the overemphasis before the jury that created and resulted in the prejudice.

The facts are, however, that it was impossible for the jury to have obeyed the Court instruction because of the emphasis that the government placed upon the tapes. The prosecution from the beginning of its case had full knowledge of the contents of these tapes and was not only fully aware of the prejudicial effect that it would have upon the jury in considering the charges against Petitioners but relied on it to convict them even though they knew they were inadmissible. This is shown by the fact that the government not only introudced the tapes but for example, one tape took the particular portion that referred to Riggin known as Buster, and was played again and again, and was used in cross-examining Klein and Riggin. All told use of the tape in question consumed several days. In addition, the government produced six detectives, who testified that on February 5, 1966, they each had listened to the recording of this tape, which is a conversation between Skeens and Klein. Each detective testified that they had heard the part

involving Petitioners. This was inadmissible as against Petitioners and, the jury was so instructed by the Court. The government, however, by this action underscored this part of the tape through these witnesses and so prejudiced the Petitioners that it was impossible for the Court to remove this from the minds of the jurors.

In *Bruton* the Supreme Court repudiated the thought that the trial judge can remove the effect of inadmissible testimony from the minds of the jurors simply by means of an innocuous instruction. *Bruton* approved the statement of Mr. Justice Jackson in his concurring opinion in *Krulewich v. United States*, 366 U.S. 440 at 453, when he said "The naive assumption the prejuducial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction . . ."

THE CASE AT HAND IS ON ALL FOURS WITH THE PRINCIPLES ENUNCIATED IN *BRUTON* EXCEPT FOR THE TENUOUS COAT-HANGING CONFRONTATION DISTINCTION. IF THIS HONORABLE COURT BELIEVES IN THE TEACHINGS THEREIN, THEN IT SHOULD SEIZE UPON THIS OPPORTUNITY TO EXTEND THE DOCTRINE OF *BRUTON* TO COVER THE CASE HEREIN UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The jury requested that the tape recordings which had been introduced in evidence be again played for them during their deliberation. This was permitted over Petitioners objections.

This part of the tape that was reiterated again and again by the six detectives had Klein saying to Skeens;

> "Buster (Riggin) called me. I hardly know Buster. He has been in my store a few times–he asked me to get a lawyer for Hamilton to help him in the trouble he was in and he was sorry that Hamilton was demanding things from me or threatening me. Klein also said to Skeens–this is what bugs, the call

> by Buster to my house like a damned fool the other night. I told Buster, I odn't know what he, Hamilton, is talking about, and if he wants to say anything against me, well, that's his prerogative. I know I did a little business with him, but never bought anything from the guy."

The following are examples of how this inadmissible evidence was over and over again emphasized to the jury to the prejudice of Petitioners:

In the prosecution's direct examination of Detective Preston concerning the tape of February 7, 1966 (Government Exhibit No. 28 at Vol. 21, pages 5338 and 5339, the following exchange took place:

> Detective Preston:. . .Then there was some conversation by Mr. Klein that he had received a phone call from Buster and that he thought that this was wrong, that the call concerned Bobby, and that he had only seen Bobby one, two, three or four times. And that the gist of the conversation, as I understood it, was that Buster wanted Mr. Klein to -
>
> Detective Preston: Was that Buster wanted Mr. Klein to get a lawyer for Bobby.

Then at Vol. 21, p. 5349, in the cross-examination of Detective Preston by Mr. Margolius'

> Detective Preston:. . .Skeens was assuring him that he wasn't going to see Klein for a lawyer, or anybody asking him for anything, that it was necessary that they talk so that they had the same stories.

At Vol. 21, page 5377, during the cross-examination of Sergeant Hudlow concerning the tape of February 7, 1966, Mr. Hudlow stated:

> . . . Some of the conversation involved–he said, "Darn Buster called me in reference, about getting an attorney for Bobby." Now this as I recall the conversation.

At Vol. 21, page 5404, during the cross-examination of Sergeant Hudlow by Mr. Margolius the following exchange took place concerning the tape of February 7, 1966:

> Mr. Margolius: All right. What was mentioned about Bobby?
>
> Detective Preston: He said that Buster called me and told me about supplying an attorney for this Bobby.

At Vol. 21, p. 5418, during the *direct examination* of Detective Wanamaker concerning the February 7th tape, Detective Wanamaker stated:

> "Their conversation started out talking about Buster calling him, Henry Klein, regarding getting a lawyer for Bobby Hamilton . . ."

At Vol. 21, p. 5440, during the *direct examination* of Captain Woodward concerning the tape of February 7th, Captain Woodward stated:

> . . .The conversation went quickly into the fact of Klein stating to Skeens that Buster had called him and wanted him to provide an attorney for Bobby. . .

At. Vol. 26 p. 6216, the *prosecution played the February 5th tape* in which the following exchange took place:

> Mr. Skeens: Well, I'll tell you another thing, you know, you might have a problem with that kid Hamilton over there.
>
> Mr. Klein: Yeah, this is what Buster called my house about the other night, like a damned fool.
>
> Mr. Skeens: Well, you see here's what happened, Henry, I was over there, you know. And beefing like Hell, he don't have any money, no lawyer. So you got to watch yourself, you know.

In Vol. 26, p. 6220, during the cross-examination of Mr. Klein, by the prosecution, the following exchange took place in reference to the February 5th tape:

> Mr. Sullivan: When you say, "Well, all I can do is say this: Like I told Buster, I don't know what he's

talking about, and if he wants to say anything against me, well, that's his prerogative. I know I did a little business with him." Whom do you mean by "him"? Hamilton, Barnes or Buster?

Mr. Klein: Hamilton.

At Vol. 31, pp. 6958 and 6959, the *prosecuting attorney made the following statements in his closing argument:*

Mr. Sullivan: And the same Buster, who, not knowing, so he said, that his nephew had anything to do wrong with Klein, not knowing Klein at all, could not deny, because Klein said it on tape—could not deny that he asked Klein to get a lawyer for his nephew. Is that the action of a man who does not know his nephew is doing something wrong with the same man with whom he is doing something wrong, the jeweler Henry Klein? It is not the action of a man who thinks his nephew is on the up and up. Why would a stranger call a man with whom he had spoken once before in his life, so he says, and say he needed a lawyer through Klein for his nephew Bobby?

At Vol. 31-A, p. 7059, the prosecuting attorney *in continuing his closing argument* stated:

Mr. Sullivan: Now, ladies and gentlemen, when Buster called Klein, we submit to you again, when he claims he didn't know Hamilton was doing anything wrong with Klein, he had to have a reason for calling and asking for a lawyer. We submit the reason comes clearly through there. There is no dispute between Klein and Skinner as to who they are talking about. They know who Hamilton is and they know who Buster is.

And at page 7060, the *prosecuting attorney continued:*

Mr. Sullivan: And we submit ladies and gentlemen, from this tape you hear very clear evidence of exactly what did take place: Buster's, Bobby's and Barnes" dealings with Klein are spelled out in that tape.

Then *continuing* on page 7060 the prosecuting attorney states:

> Mr. Sullivan: We submit to you that that is clear evidence that these men were very well acquainted and were associated in this enterprise.

At Vol. 33, p. 8105, near the end of the prosecuting attorney's closing argument *he again played a portion of one* of the tapes in which Mr. Klein made the following statement:

> Mr. Klein: I don't do anything for anybody, Bobby or anybody, because I just can't, I just can't do it.

The repeated references to this inadmissible telephone conversation must necessarily have had the effect of making an indelible impression upon the minds of the jury. The Court of Appeals concluded that there was this prejudice but erroneously concluded that it only affected the conspiracy count and not the substantive offenses. In light of the above detailed showing of how extensive this inadmissible testimony was presented to the prejudice of Petitioners it could not but extend to all counts of the indictment.

3. Petitioners challenge the search warrant, not on the ground of probable cause, but rather on the ground that the property to be searched for was so broadly described as to render the warrant a general one, in violation of the 4th Amendment. The Supreme Court has held that a search warrant shall particularly describe the things to be seized, rendering a general search impossible and preventing the seizure of one thing under a warrant describing another. "As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron v. United States*, 275 U.S. 192 at 196.

In the present case, the officers were directed to seize all books, records, and "related paraphernalia maintained in the furtherance of the conspiracy." The police, in executing the warrant, seized everything in the nature of books, records and documents which they could find, with-

out examining the same and literally threw them into boxes for removal (TR-651-664). In other words, all records of any nature and description which the searching officers could find were seized. The return to the warrant clearly demonstrates the generality of the search by stating that all items were collected in four boxes and several bags and "contained multiple bank statements, jewelry receipts, phone numbers, bills, receipts, papers and other written, typed and printed matter." It is submitted that like the case of *Stanford v. Texas*, 279 U.S. 476, "The indiscriminate sweep of that language is constitutionally intolerable." The Court, in its opinion, recognized the broad sweep of the warrant when it stated (page 5) that the "large amount of written business records seized undoubtedly lies close to the boundary of seizures permitted by the 4th Amendment." To sustain the search in the present case is to license writs of assistance, for it leaves to the discretion of a police officer the determination of what may or may not be relevant, and therefore permits him to take whatever he may find, whether relevant or not. As appears from the record and as sanctioned by the Court in its opinion, an officer serving a search warrant may remove everything which he finds upon the premises to be used by the prosecutor as he, in *his* discretion, may determine. This was not the intention of the 4th Amendment, nor should it be condoned by the Court.

In determining the issue, the guilt or innocence of Appellant is not material. Even if this Court feels that the evidence of guilt is overwhelming, the validity of the search should be determined independently. Considered in this light, it is submitted, the search should fall. The decision of the Court would establish a dangerous narrowing of the protection of the 4th Amendment.

4. It is clear that a person can be convicted both of the substantive crime and conspiracy to commit that crime where evidence in each case pertains to the charge at issue. It is axiomatic that where the evidence introduced in both trials is for all practical purposes identical and the totality

of that evidence is directed to the substantive charge with a corresponding void of evidence of conspiracy, and issue tantamount to double jeopardy is raised.

Co-defendant in the case at bar, Robert Hamilton, had been convicted of grand larceny and housebreaking in concention with the burglary of the Saints Constantine and Helen Greek Orthodox Chruch. This case was tried in the United States District Court for the District of Columbia between June 19 and June 26, 1967 (Criminal No. 1133-64).

In the trial of the instant case Hamilton was convicted on the conspiracy count. Although the list of overt acts in the indictment of the conspiracy count did not mention the Greek Church robbery, testimony concerning this crime was in prominence at the trial. The only substantial evidence concerning the overt acts of the conspiracy count was the uncorroborated testimony of Barnes.

An inspection of the testimony used by the prosecution in the conviction of Hamilton in Criminal No. 1133-64 and the testimony concerning the Greek Church introduced in the case at bar willl reveal that in both instances the testimony was substantially the same. See Chart on pages 84, 85, 86 of Hamilton's Brief in the United States Court of Appeals for the District of Columbia.

From the above it is apparent that the testimony used by the prosecution at both trials was substantially the same. It consisted of what transpired on the night of the burglary, the physical evidence taken, and its subsequent analysis. Although Barnes allegedly took part in the Greek Church robbery and was mentioned in the testimony in both cases, at no time has the prosecution presented evidence to convict Robert Hamilton of conspiracy with Barnes or anyone else to burglarize the Greek Church.

Although the evidence in both instances was virtually the same and in no way supported the idea of a conspiracy, testimony concerning the Greek Church was prominent in this trial.

This is particularly revealing when considered with the fact that the testimony regarding the Greek Church robbery which linked the actions of Barnes and Hamilton came from credible police officer witnesses, while the testimony concerning the overt acts listed in the conspiracy count rested upon the uncorroberated testimony of Barnes, a man of dubious credibility.

It is our contention that the jury would not have convicted them on the conspiracy count solely upon the uncorroberated testimony of Barnes. Thus, the conspiracy conviction was directly due to the highly credible testimony concerning the Greek Orthodox Church burglary in which Barnes and Hamilton were mutually implicated. This was the same evidence upon which Hamilton had previosuly been convicted. The resultant situation is tantamount to double jeopardy or res judicata.

We also can see the vicarious prejudice to the other petitioners where there was no corroboration of Banres charges but the Government using this subterfuge created a feeling in the mind of the jurors that the Government having conclusively proved this one particular case must be right in asking for a verdict of guilty against them. This evidence had nothing to do with the other three petitioners.

Agreeing that this does not fit the classical definition and case law on double jeopardy the inherent unfairness revealed must certainly be covered within that provision, or the conspiracy law allowing this unfair result must necessarily be unconstitutional

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX 1

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,889

ROBERT HAMILTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 21,892

HENRY KLEIN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 21,894

WALTER F. RIGGIN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 21,895

EARL W. TAVENNER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeals from the United States District Court
for the District of Columbia

Decided July 31, 1970

Mr. Ira M. Lowe (appointed by this court) for appellant in No. 21,889.

Mr. Bernard Margolius for appellant in No. 21,892.

Mr. H. Clifford Allder for appellants in Nos. 21,894 and 21,895.

Mr. Harold J. Sullivan, Assistant United States Attorney, with whom *Mr. David G. Bress,* United States Attorney at the time the brief was filed, was on the brief, for appellee. *Messrs. Thomas A. Flannery,* United States Attorney, and *John A. Terry,* Assistant United States Attorney, also entered appearances for appellee.

Before DANAHER, *Senior Circuit Judge,* and WRIGHT and MACKINNON, *Circuit Judges.*

WRIGHT, *Circuit Judge*: These cases involve four of 16 individuals charged with being members of a highly organized burglary ring in the greater Washington, D. C. area. During a 15-month period in 1964 and 1965, this organization, which included several Washington policemen, was allegedly responsible for several hundred burglaries involving more than two million dollars in stolen property. The four appellants here were each charged with[1] and convicted of single counts of conspiracy, housebreaking and grand larceny.[2] Appellants urge numerous grounds for reversal. For

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[1] Appellant Hamilton was also charged with interstate transportation of stolen property, but the jury acquitted him on this charge.

[2] Appellants Klein, Hamilton and Riggin were sentenced to

the sake of convenience, we consider in Part I appellants' assignments of error which affect all of their convictions, and in Part II those arguments which reach solely to the conspiracy count.

I

Initially, appellants urge they were prejudiced by the trial court's refusal to order a psychiatric examination of the Government's principal witness, Robert Earl Barnes. The trial court's opinion denying such an order emphasized that appellants had not provided any substantial factual predicate for their request and that the results of a previous psychiatric evaluation of Barnes—which found no psychosis—would be available to the defense. *United States* v. *Klein*, D. D.C., 271 F.Supp. 506 (1967). On the basis of the trial court's opinion, we find no reason to disturb its ruling.

Appellants next challenge the trial court's failure to provide them with some 250 pages of Barnes' grand jury testimony, relying on *Dennis* v. *United States*, 384 U.S. 855 (1966). We find no merit in appellants' position. The portions of Barnes' grand jury testimony that were not turned over to the defense constituted a small fraction of Barnes' total testimony before the grand jury. The trial court granted discovery to appellants of the vast majority of Barnes' testimony.[3] In *Dennis*, the Supreme Court explicitly stated:

> "The trial judge's function in this respect is • • • to supervise the process: for example, to cause the elimination of extraneous matter and to rule upon applica-

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concurrent prison terms of 16 months to four years on each count. Appellant Tavenner was sentenced to one to three years in prison on each count; his sentences are also to run concurrently.

[3] The Government provided the transcript to the defense prior to Barnes' direct examination.

> tions by the Government for protective orders in unusual situations * * *."

384 U.S. at 875. The trial court specifically found in the present case that the materials denied the defense were "information unrelated to the instant charges, matters unrelated to the present trial and currently under investigation, and matters pertaining to individuals identified in the testimony who are entitled to protection from adverse publicity attendant on having their names raised in connection with the instant case." Moreover, the trial judge itemized the portions denied the defense, and this material was transmitted to this court. We have carefully examined it and, with one exception,[4] find the trial court's description entirely accurate. Consequently, appellants were properly denied access to it.

Appellants also challenge the legality of a police search of Klein's office and the seizure of his business records, pursuant to a search warrant. The trial court conducted a suppression hearing on appellants' motions and held against appellants. We have reviewed the lengthy affidavit which was the basis on which the search warrant was issued and find that it substantially exceeds the requirements set out in *Aguilar* v. *Texas*, 378 U.S. 108 (1964), and *Spinelli* v. *United States*, 393 U.S. 410 (1969). Moreover, the affidavit sets out in some detail the extensive conspiracy alleged, the

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[4] Eight pages of Barnes' testimony which were denied to the defense involved a burglary charged as an overt act of the conspiracy. These pages should have been made available to the defense. However, Barnes' account to the grand jury regarding this burglary was entirely consistent with his testimony about it at trial, and we, therefore, believe that this error was harmless and did not affect substantial rights of appellants. *Kotteakos* v. *United States*, 328 U.S. 750 (1946); Rule 52(a), FED. R. CRIM. P. The relevant pages from the grand jury transcript Volume 28, pages 1465-1470, and Volume 5, pages 205-207, should nevertheless be made available to defense counsel on request.

specific premises to be searched, and the business records used in furtherance of the conspiracy which were to be seized. While the large amount of written business records seized undoubtedly lies close to the boundary of seizures permitted by the Fourth Amendment, we think the police officers' affidavit supplied the substantial justification and specificity necessary for the search conducted.

Appellants' next objection is to the introduction into evidence of out-of-court statements made by appellant Klein.[5] The Government obtained these statements by electronically monitoring Klein's conversations with an informer who was cooperating with the Government. Appellants, relying on *United States* v. *White*, 7 Cir., 405 F.2d 838, *cert. granted*, 394 U.S. 957 (1969), argue that the Government "seized" these conversations in violation of the Fourth Amendment and they were, therefore, improperly admitted in evidence. The Seventh Circuit in *White* applied the principle announced in *Katz* v. *United States*, 389 U.S. 347 (1967), retroactively. Since *White* the Supreme Court, in *Desist* v. *United States*, 394 U.S. 244 (1969), has limited the *Katz* ruling to prospective application. So neither *Katz* nor *White* can help appellants here. We are, of course, aware that the Supreme Court in *White* may reconsider its prospective only ruling in *Desist*. We need not wait on *White*, however, because appellants' position on this issue can be protected through an application for a writ of *certiorari*.[6]

Finally, appellants challenge the trial court's action in

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[5] The Government introduced tape recordings of four conversations and had police officers testify to the substance of a fifth conversation. The informer did not testify. These out-of-court statements were admitted only against appellant Klein.

[6] Also as here, the facts in *White* present this additional issue for determination: whether consensual eavesdropping evidence is admissible where the consenting party is not called by either side.

permitting the jury during its deliberations to hear the Klein tape recordings, while denying the jury's request to see Barnes' grand jury testimony. The tape recordings were in evidence, and it is within the discretion of the trial court to send exhibits which have been admitted in evidence to the jury. *Robinson* v. *United States,* 93 U.S.App.D.C. 347, 210 F.2d 29 (1954). It is similarly apparent that the trial court's refusal to send the jury Barnes' grand jury testimony which was not in evidence was required by decisions of this court. *Sawyer* v. *United States,* 112 U.S.App.D.C. 381, 383-384, 303 F.2d 392, 394-395 (1962).

II

We now turn to appellants' challenges which are limited to the validity of their convictions of conspiracy.

Appellants were convicted of conspiring together in one general conspiracy to violate the theft and housebreaking statutes as charged in the indictment. Appellants urge, however, that the evidence adduced by the Government, if believed, established many separate conspiracies and, citing *Kotteakos* v. *United States,* 328 U.S. 750 (1946), argue that their convictions on the conspiracy count should be reversed. The evidence adduced by the Government in this case was substantial and exhaustive in a trial which stretched over a period of six weeks. It tended to show that Klein set up burglaries for Barnes for a percentage of the take and also fenced much of the stolen property. Riggin, Tavenner and Hamilton assisted Barnes on various burglaries and also set up other burglaries. The Government's evidence tended to show that appellants knew of each other's activities and cooperated in, planned or executed numerous burglaries together. We have carefully reviewed the record and find that the Government made out a *prima facie* case that appellants conspired in the single conspiracy as charged.[7]

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[7] We also take note that the trial judge charged the jury in

Appellants' second claim relating to the validity of their conspiracy convictions concerns their requests for separate trials.[8] The trial court denied their motions for severance, and appellants argue that this action was error. Appellants Hamilton, Tavenner and Riggin focus their complaint in this regard on the Government's introduction into evidence of the conversations between appellant Klein and an informer referred to above. These out-of-court statements were admissible, if at all, *see* page 5 *supra* only against Klein as admissions, but they were inadmissible against the other three appellants since the conversations occurred after the termination of the conspiracy. The contents of these conversations, to the extent they incriminate these three appellants at all, relate solely to the existence of a conspiracy. In our view, therefore, their challenge on this ground reaches only their conspiracy convictions.

Turning to the merits of their argument, we agree that this case comes within the rule announced by the Supreme Court in *Bruton* v. *United States,* 391 U.S. 123 (1968), and made retroactive by *Roberts* v. *Russell,* 392 U.S. 293 (1968).[9]

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clear language on this point:

> "If you find from the evidence that Robert Earl Barnes engaged in separate conspiracies with some of the other individual defendants but did not engage in a single conspiracy alleged in the indictment, then you must find the defendants not guilty on the first count of the indictment."

[8] Appellant Klein also urges that it was error to deny his motion for a separate trial; his argument reaches the validity of all of his convictions. We find his claim, however, to be entirely without merit. *See* Rule 8(b), FED. R. CRIM. P.

[9] In the present case, appellant Klein took the stand and was available for cross-examination by his co-defendants. One court has held that in such circumstances *Bruton* is not applicable. *Santoro* v. *United States,* 9 Cir., 402 F.2d 920 (1968). Such a holding, however, seems to be at variance with the Supreme Court's effort to protect a defendant from the prejudice of evi-

Thus the trial court's instructions to the jury that Klein's out-of-court statements were evidence only against Klein were not adequate to protect his three co-defendants if they were prejudiced by these out-of-court statements.

However, applying the rule of *Chapman* v. *California*, 386 U.S. 18 (1967), made applicable to *Bruton* by *Harrington* v. *California*, 395 U.S. 250 (1969), we find beyond a reasonable doubt that, because of the overwhelming weight of the evidence, the admission of Klein's out-of-court statements did not affect the jury's verdict as to his co-defendants. Actually the issue is not of transcendent importance in this case since the sentences imposed on the conspiracy count all run concurrently with those imposed for substantive offenses.[10]

Other issues have been raised, but none which merit further discussion. Accordingly, the judgments of conviction of all appellants are

Affirmed.

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dence which is inadmis ble against him. Attempts to cross-examine the co-defendan about his out-of-court statement may only exacerbate the prejudice which *Bruton* sought to avoid. Moreover, when the Government knows that it plans to introduce a co-defendant's out-of-court statement, there is no reason why that defendant cannot be tried separately.

[10] Appellant Hamilton separately challenges his conviction of conspiracy on the ground that evidence of a burglary for which he had already been convicted was introduced to prove his participation in the conspiracy. Hamilton argues that this situation "is tantamount to double jeopardy or *res judicata*." We think the law in this area is well established to the contrary. *See Pereira* v. *United States*, 347 U.S. 1 (1954).

DANAHER, *Senior Circuit Judge,* concurring: I concur in Judge Wright's opinion. I submit my further comments only that, taken together, our respective texts may be the more explicit respecting electronic surveillance of conversations between the appellant Klein and James Skeens and his wife, Marsha.

One can only vaguely sense the magnitude of the bizarre conspiracy revealed by the record here. An investigation was conducted under the direct supervision of the United States Attorney. Charges by the professional burglar Barnes had involved police corruption. The total depredations ranged throughout the District of Columbia and its environs. The conspiratorial ring included Barnes, certain venal police officers, these appellants and other collaborators. One James Skeens came within the scope of the investigation. Skeens had been a customer of a jeweler, the appellant, Henry Klein. Skeens introduced the burglar Barnes to Klein who willingly became a fence. An arrangement was entered into as to the price Klein was to pay for stolen jewelry, and Klein, for his part, provided Barnes and other conspirators with the location of the residences of his own customers whose jewelry might be stolen.

As the investigation proceeded, Marsha Skeens met with the Assistant United States Attorney in charge of the investigation and with members of the investigating squad. She decided to cooperate, explaining that she thought she might be of assistance to her involved husband as well as to Barnes.

At a time when arrests had yet to be made, she participated in monitored phone calls with Klein on November 29 and December 21, 1965.

She ultimately persuaded her husband to become an informant, and conversations between Skeens and Klein were monitored on February 5 and February 7, 1966.

Prior to trial, the appellants moved to suppress the evidence gathered as a result of electronic surveillance. A court hearing was conducted in which both James Skeens and his wife Marsha testified as did various officers of the Metropolitan Police. The pre-trial judge expressly found that Skeens and his wife had prior knowledge of the intended surveillance and had given full consent that the conversations with Klein be monitored, recorded, and in due time, divulged.

The judge further concluded that there had been no violation of the Federal Communications Act and, in light of pre-*Katz* [1] rulings, that no constitutional rights had been abridged.

The appellants here had relied principally upon the *Katz* case and on *United States* v. *White* (7th Cir.) 405 F.2d 838, *cert. granted* 394 U.S. 957 (1969).[2]

Two months after the *White* decision, the Supreme Court released its opinion in *Desist* v. *United States*.[3] There the Court held that *Katz* is to be applied only to cases in which the prosecution seeks to introduce the fruits of electronic surveillance conducted after December 18, 1967.

Then came our decision in *Wallace* v. *United States* [4]

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[1] *Katz* v. *United States*, 389 U.S. 347 (1967).

[2] The majority opinion of the Seventh Circuit noted that on its facts, On Lee v. United States, 343 U.S. 747 (1952), "is directly in point and would control the disposition of this case if *Katz* had not supervened and if the Supreme Court had not on other occasions completely eroded the decisional basis of *On Lee*." 405 F.2d 838 at 847.

[3] 394 U.S. 244 (1969).

[4] —— U.S.App.D.C. ——, 412 F.2d 1097 (1969). The Seventh Circuit came to a like conclusion in *United States* v. *Teller*, 412 F.2d 374, 377 (1969).

where Judges McGowan, Tamm and Leventhal considered the appeal of the police officers who had been involved in the Barnes-Klein conspiracy. There, also, were raised questions concerning certain face-to-face and telephone conversations between appellants Wallace and Donohue and the same James Skeens about whom we have been writing. It was argued in the Wallace case that the recordings were inadmissible. Our court, however, pointed out:

> ". . . The Supreme Court has now held that the exclusionary rule adopted in *Katz* shall not be applied to evidence obtained through electronic surveillance conducted before December 18, 1967, the date of the *Katz* decision, and the conversations involved here took place nearly two years before that date." [Citing *Desist* v. *United States*, 394 U.S. 244, and see *Kaufer* v. *United States*, 394 U.S. 458]. See 412 F.2d at 1100.

The Second Circuit had previously decided *Kaufer* v. *United States*,[5] and had expressly rejected the Seventh Circuit's *White* decision. The Supreme Court in its affirmance in the *Kaufer* case expressly relied upon *Desist* v. *United States, supra.*[6]

So now, this case involving burglaries of scores of homes in Washington and perhaps two million dollars in loot is now up to the Supreme Court. Obviously, both Klein and the Government are entitled to an immediate and final decision. The evidence overwhelmingly establishes the guilt of all the appellants, including Klein. I mention Klein specifically for the recorded conversations were his own, were

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[5] 406 F.2d 550, *affirmed* 394 U.S. 458, *rehearing denied* 395 U.S. 917 (1969).

[6] The Seventh Circuit applying *Desist* noted that recordings involving one Epps had been made more than two years before December 18, 1967, and observed that it had first relied upon its own opinion in the *White* case and additionally had been "guided or perhaps misguided by *Katz* v. *United States.*" *Doty* v. *United States*, 416 F.2d 887, 893 (1969).

conducted with willing informants, Skeens and Mrs. Skeens, in whom he had misplaced his confidence, and the recordings corroborated testimony of Barnes and others. Quite in accord with the law as it stood before *Katz*,[7] there had been no trespass by the Government upon his person or his property.

Thus I agree that we should affirm the convictions of all named appellants.

I am authorized to state that Circuit Judge MacKinnon concurs in the foregoing opinion.

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[7] Even if it could be said that Katz here applies, it should be remembered that unlike this case, neither party to the conversations in Katz knew of or consented to the electronic surveillance.

Students of the problem will note the concurrence of Mr. Justice Black in Desist, *supra*, citing his dissent in Katz.

APPENDIX 2

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,889

September Term, 1969
Criminal 595-66

Robert Hamilton
v.
United States

Filed Aug. 28, 1970

No. 21,894
Walter F. Riggin
v.
United States of America

No. 21,895
Earl W. Tavenner
v.
United States of America

Before: John A. Danaher, Senior Circuit Judge; Wright and MacKinnon, Circuit Judges in Chambers

ORDER

On consideration of appellant's petition for rehearing, it is

ORDERED by the Court that appellant's aforesaid petition is denied.

Per Curiam
For the Court:

NATHAN J. PAULSON, Clerk